Brexit

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BREXIT: Challenges for Environmental Law

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The United Kingdom's withdrawal from the EU raises many issues. This paper gives a brief overview of some of the challenges in the context of environmental law, considering the structural issue of how UK and EU law are entwined, the international dimension and possible implications for the substance of environmental law. The complexities of negotiating the withdrawal and of co-ordinating the legal measures to achieve formal withdrawal and to establish whatever new relationships are to be in place with the EU and the wider world are not considered.

At a simplistic level achieving "Brexit" may seem straightforward. Parliament just has to repeal the European Communities Act 1972 and the authority of all EU law - the evil Eurocrats in Brussels and the meddling judges in Luxembourg - disappears. Unfortunately it is not as simple as that. After over 40 years EU law is not a separate entity existing apart from the rest of our law but is integrated into our law in many ways and has shaped the way we do so many things.

How EU law is embedded

It is in the very nature of the EU legal system that the provisions of EU law are not distinct from domestic law but embedded in it. There are some examples of directly applicable EU law which stands apart and can be readily isolated, but in most areas there is at a least some interconnection with domestic law. Moreover, you cannot flick through the statute book and see immediately which provisions come from the EU and which are home-grown. Four main categories of EU based provisions can be identified along with the simpler case where EU law stands alone and complete:

1) All of the relevant law is to be found in EU measures:
In some cases the Treaty provisions and EU regulations offer a complete legal picture on a topic. This, however, is rare since usually some supporting UK measures are needed to set broader regulatory frameworks, to authorise public bodies to act or to support implementation.

2) Legislation which was inspired by the need to comply with EU obligations but is completely self-contained in UK legislation:
There are many examples of this, such as the provisions on public registers in various regulatory regimes, e.g. the Pollution Prevention and Control (Scotland) Regulations 2012 (SSI 2012/360) reg.64. Such registers were first introduced as part of response to the original EU Directive on public access to environmental information (Dir. 1990/313) but stand on their own regardless of that background (although there may be questions of interpretation as noted later).

3) Legislation which was inspired by EU obligations but is largely self-contained although with occasional references to EU measures:
An example here is the Environmental Assessment (Scotland) Act 2005 which was inspired both by the Strategic Environmental Assessment Directive (Dir. 2001/42) and by the desire

of the Scottish Government to embed this as a wider policy tool, not limited to the specific categories of plans covered by the EU requirement. The text has a few references to EU measures in defining the exact scope of the provisions (e.g. s.4(3)) but all the key parts of the Act can stand on their own, regardless of the EU background, and it would be possible to make the Act work without the EU elements when EU law is no longer relevant.

4) Legislation where incorporation of EU law is an essential element for the law to make sense:
An example here is that the legal definition of "waste" which lies at the centre of the law on that topic is essentially defined in terms of the EU Waste Directive (Dir. 2008/98) (Waste Management Licensing (Scotland) Regulations 2011, SSI 2011/228, reg.2). This is clearly wholly unworkable if it is no longer possible to have any reference to EU law so that the whole framework in the domestic legal regime falls apart unless the EU measure is either replaced or allowed to continue to have legal force.

5) Legislation which serves to support EU law and has no role or meaning at all if EU law is no longer regarded:
There is some UK legislation which provides for the enforcement of EU laws where the substantive content of these rules is not set out in any UK law. For example, the Control of Trade in Endangered Species (Enforcement) Regulations 1997, SI 1997/1372, supports controls on the import and export of endangered plants and animals by creating offences and conferring powers of entry and search, but the substantive rules on what species are covered and on when permits are required etc. are not set out in any UK law but solely in EU Regulations. If EU law ceases to have effect, then there will be no law on this subject and nothing for 1997 UK Regulations to enforce. A further aspect here is that the UK needs to have rules in this area to comply with its international obligations under the Convention on Trade in Endangered Species which the UK ratified in 1976.

So what happens on Brexit Day? If Parliament simply says that all EU laws no longer have legal force, we are left with a mess. That approach would not eliminate all of the EU legacy since measures wholly embedded in UK legislation would continue unaffected. It would also leave large chunks of UK law with major holes in them which will in effect prevent them from operating and open up a legal vacuum in areas where there would be no valid legal rules at all.

If that is to be avoided, there seem to be two basic options. The first is to review all of our laws, identify all of the provisions directly or indirectly linked to EU law, decide whether we want to lose them, keep them in amended form or continue them in force, and then replace every provision we want with a properly made domestic one, all to be achieved between now and Brexit Day. This is a vast task and it seems unimaginable that there will be the resources to achieve this. The alternative is to pass a law that provides that all the law in force on Brexit Day continues to have effect, including measures in EU legislation, whether free-standing or incorporated directly or by reference into domestic laws (cf. the example of Irish independence: Government of Ireland Act 1920, s.61). This option provides continuity, avoids legal vacuums emerging and gives time for reflection and work in identifying what parts of EU-inspired law we want to keep and what we want to change or dispose of (although a few headline examples might perhaps be identified to disappear on Brexit Day). Some such continuity of law provision is arguably essential as the default position while we undertake the more detailed assessment of what to keep, change or get rid of.

Interpretation

Where the law has EU origins, either directly or indirectly, UK courts are currently bound, to interpret it in the light of the EU provisions and the case-law of the CJEU (European Communities Act 1972, s.3(1)). This has led to the courts producing interpretations which stretch the words of a provision in a direction and to an extent which would not be the case if a purely domestic approach had been taken. In the event of Brexit, there would clearly be no basis for stretching the words to ensure compliance with EU requirements, but the question arises of whether after that date all reference to the EU context should be forbidden.

The approach taken in the Brexit legislation will be significant. Unless that legislation expressly prohibits all reference to EU materials, then where a provision has an EU background, whether because it is domestic law inspired by the EU or an EU measure continued in force as proposed above, it would still be possible to refer to the EU context as one strand, although no longer the decisive one, in the task of interpretation. If a more thorough extirpation of the EU inheritance is adopted, then all consideration of the EU background and materials, including the case-law from Luxembourg, would be excluded, forcing an interpretation that ignores a key element of the context.

Moreover, there is also the question of whether existing interpretations, reached by UK courts but based on EU material, could be re-visited to take account of the withdrawal, focusing attention on the statutory provisions themselves and their narrower UK context without being influenced by the wider EU background. For example, even if the definition of "waste" currently found in EU legislation were to be continued after Brexit, would it possible to go back several steps and develop a distinctly British interpretation of it, based on the statutory words alone and British rules of interpretation, setting aside the attempts of the British courts over the years to make sense of and apply the Delphic comments of the European Court (see the comments of Carnwath LJ in *R (OSS Group Ltd) v Environment Agency* [2007] EWCA Civ 611, [2007] 3 CMLR 30, [2008] Env LR 8, [69])?

Law-making power

The European Communities Act 1972 confers on Ministers a very broad power to make laws "for the purpose of implementing any EU obligation …, or enabling any such obligation to be implemented, or of enabling any rights enjoyed … by virtue of the Treaties to be exercised" or "for the purpose of dealing with matters arising out of or related to any such obligation or rights" (s.2(2)). This is a very heavily used power which provides the authority for subordinate legislation in a very wide range of areas, from the Control of Major Accident Hazards Regulations 2015, SI 2015/483 and the Environmental Information (Scotland) Regulations 2004, SSI 2004/520 to the Racing Pigeons (Vaccination) Regulations (Northern Ireland) 1995 SRO 1995/168 and the Sheep and Goats Identification and Movement (Interim Measures) (Wales) (Amendment) Order 2002, SI 2002/811.

In most cases there will be overlapping powers within the specific domestic statutory regimes. Nevertheless, the existence and use of such broad law-making powers has meant that in areas where the major policy and legal initiative lies in the hands of the EU, there has been no need to ensure that the terms of the most likely alternative domestic parent Acts

actually confer specific power to do everything that might be required. In the absence of the catch-all provision under the 1972 Act, unfortunate lacunae might be found, inhibiting the government's power to act in a range of circumstances.

The ability to rely on the very broad powers in the 1972 Act has also avoided another area of possible legal complexity and uncertainty. One of the features of the devolution settlements is that the Westminster authorities retain the power to legislate in matters where EU obligations and rights are concerned, even on topics which are normally devolved matters (e.g. Scotland Act 1998, s.57). The ability to use this broad power to legislate at UK or Great Britain level has meant that where there is a willingness to allow London to act, there has been no need to dissect proposals into devolved and reserved matters and divide legislative responsibility accordingly. This option for less fragmented legislation may no longer be available.

Devolution

This raises a further indirect but very important role of EU law at present: its effect in dampening the consequences of devolution. Environmental law matters are largely devolved under the devolution settlements for Scotland, Wales and Northern Ireland. There were differences between each country even before the current devolution structures were introduced, but these have become more pronounced since. Differences exist in relation to the administrative structures, e.g. the greater integration which has led to the creation of Natural Resources Wales, to enforcement mechanisms, e.g. the different scope of so-called "civil sanctions" in each country, and to the substance of the law, e.g. in relation to the willingness to accept genetically modified crops and new nuclear power stations.

Yet the facts that EU law accounts for so much of our environmental law and that all jurisdictions are bound to operate within the framework set by EU law have meant that the capacity for each country to head off in its own direction has been limited. No country can decide to set its own water quality standards or to abolish controls on pesticides or to introduce far-reaching restrictions on diesel engines without falling foul of EU law and thus not only risking infringement proceedings from Europe but also, in the case of the devolved authorities, exceeding their legal powers. There is room for national differences to emerge, but within limits.

With Brexit, this constraint will be removed and the different counties could develop radically different environmental laws. Providing the room for such difference is, of course, one of the major justifications for devolution in the first place, but there are consequences if the result is a fragmentation of the law. The divergence of environmental law within the UK has not been viewed as a major issue, since the need to fit within the EU framework has ensured that such divergence will be kept within workable limits. In the absence of the EU, those affected by environmental laws that are becoming more differentiated may be more concerned at the prospect of increased divergence and there may be a call for new mechanisms for addressing the levels of co-ordination and difference on particular issues, akin to the Joint Nature Conservation Committee for biodiversity issues.

International Obligations

The UK's withdrawal from the EU does not free it from all external legal obligations. The UK will continue to be bound by many international treaties, so that constraints on the UK's freedom of action will continue. Indeed it is often overlooked that what we see as EU measures are sometimes the result of international agreements which will continue to bind the UK even after Brexit. Obligations in relation to air pollution, nature conservation, chemical safety and many other areas will continue, as will the obligations to provide access to information, public participation and access to justice under the Aarhus Convention. One complication is that for treaties where the UK is bound because of the signature by the EU in areas of its exclusive competence the UK will have to become a party in its own right (subject to any negotiations with the EU and the other parties). The key point, though, is that international obligations beyond the EU will continue to constrain the UK's freedom of action. The big difference, of course, is that whereas EU law is very detailed, the EU structures provides strong (if slow) measures to enforce compliance by states and domestic courts ensure that individuals can enjoy the rights conferred by EU law, the same does not apply for international law.

New obligations are also inevitable. The withdrawal agreement with the EU will create a new legal relationship, with more or less access to the Single Market and with that more or less freedom to set standards on environmental and other grounds. The close links within the European Economic Area require the application of most EU standards but it is worth noting that even the looser trade agreements between the EU and other states, such as the Ukraine or Canada, include provisions seeking high levels of environmental standards, the application of the precautionary principle and a commitment not to relax environmental laws in order to attract trade or investment (e.g. Association Agreement between the EU and Ukraine, [2014] OJ L 161/3, arts 290, 292, 296).

Substantive Impact

As well as these primarily structural points about the shape and shaping of environmental law post-Brexit, the substantive nature of the law also needs to be considered. The UK's environmental law today is very different from environmental law when the UK joined the EU in 1973, and although undoubtedly the UK on its own would have made major steps towards environmental improvement, membership of the EU has certainly ensured that action was taken on a faster timetable and more thoroughly than would otherwise have been the case. The likelihood is that much of the law will continue as it is, but four general points can be made within this large and complex area, in addition to the risk of fragmentation within the UK already mentioned in relation to devolution. (For a more thorough analysis see: Burns et al, *The EU Referendum and the UK Environment: An Expert Review* available at http://environmentEUref.blogspot.co.uk/).

The first is to note that obligations inspired by EU law tend to be of a rather different nature from those which were based on purely domestic rules prior to the UK's membership. EU environmental law has tended to impose obligations on Member States, that is on Ministers, which are based on targets to be met (e.g. recycling rates) or outcomes to be achieved (e.g. specific air or water quality). This is different from the approach in older domestic law which tended to favour very broad statements of purposes or functions supported by largely discretionary powers, leaving it to the executive body concerned (e.g. the Minister or an agency) to determine for itself the outcome that should result once all relevant considerations have been duly taken into account. Although the use of fixed standards is

now an accepted part of UK environmental law, it is possible that some discretion might return, allowing some room for manoeuvre when meeting the standards seems particularly difficult, expensive or disproportionate or conflicts with other policy goals.

A second point is that EU law provides a means of calling the government to account. Where it is argued that a state is falling short of its obligations under EU law there are means (imperfect though they are) for using the Court of Justice to seek compliance. Moreover, the UK courts themselves are in a positon to insist that the authorities keep to the long-term promises embodied in EU law, such as in the recent litigation over air quality targets (*R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28). In the absence of the EU dimension, however, there are much more challenging questions over how the government can be held to account over its environmental commitments, as shown in the debates and uncertainty about the status and enforceability of the greenhouse gas reduction targets in the Climate Change Acts (e.g. Reid, "A New Form of Duty? The Significance of 'Outcome' Duties in the Climate Change and Child Poverty Acts" [2012] Public Law 749).

A third point is to note the comparative stability of EU environmental law and policy. It takes a long time for initiatives to proceed through the EU law-making process, but once made, they tend to "stick", without constant change. This makes them well-suited to the long-term efforts required to tackle major environmental problems such as water quality and climate change. The setting of targets for several years in the future and the stability of environmental standards enables industry and investors to plan ahead and allows for the integration of different policy areas to be developed. The greater scope for rapid change outwith the EU brings both the advantages and disadvantages of flexibility, with the potential to respond more quickly to changing circumstances but also a lack of certainty as to the future.

Related to this is the final point that the UK will now be able to make a choice over whether or not to maintain the law inherited from the EU. Many of the major elements in our environmental law have EU origins, from environmental impact assessment through the definition of waste to air and water quality standards. The UK - or rather in view of the devolution settlements, the devolved administrations - will have the choice whether or not to continue such measures, with or without adjustment (subject to the constraints that might arise in relation to future access to the Single Market). There is no reason to expect a sudden and substantial change in most areas. Nevertheless, the new freedom of action would allow for a radical strengthening of environmental protection on some issues, although the deregulatory tone of much of the current UK government's rhetoric (and even more of the Leave campaign) might suggest that this flexibility is more likely to be used to reduce the extent to which environmental protection is pursued when it conflicts with other policy goals.

Conclusion

For environmental law overall, the most significant changes are likely to be not so much in the details of any legislation, but the new vulnerability of environmental rules to short-term political pressures and the removal of the means by which the government can be called to account. Whatever its flaws, the EU has provided a stable framework of environmental law and the means to ensure that governments and others live up to their obligations. The post-

Brexit world will be more volatile. We do not know what the coming years will bring in terms of the details and timing of the UK's withdrawal, the nature of future relationships with the EU and others or the extent to which existing laws based on EU measures will survive unchanged. The one certainty is uncertainty.